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No. 94-405

In the Supreme Court of the United States

OCTOBER TERM, 1994

GAETANO VASTOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the "satisfactory explanation" for a delay in sealing wiretap tape recordings, which is required by 18 U.S.C. 2518(8)(a) to justify admissibility of the tapes, may be offered and considered for the first time after conviction and remand to the district court.

2. Whether the requirement that the government prove a "satisfactory explanation" for the sealing delay was met in this case.

3. Whether petitioner's RICO conviction may be upheld despite inconsistent jury verdicts and the insufficiency of the evidence on some, but not all, of the predicate offenses charged.

4. Whether there was sufficient evidence to support petitioner's RICO conspiracy conviction.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-26) is reported at 25 F.3d 164. Previous court of appeals' opinions in this case are reported at 989 F.2d 1318 (Pet. App. 27-57), 915 F.2d 865 (Pet. App. 58-88), and 899 F.2d 211 (Pet. App. 89-162).

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1994. A petition for rehearing was denied on June 16, 1994. Pet. App. 306-307. The petition for a writ of certiorari was filed on September 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a participant in the operation of an enterprise through which he committed various crimes, including extortion, schemes to defraud suppliers of businesses controlled by the enterprise, and insurance and bankruptcy fraud. Pet. App. 3, 31. The headquarters for the enterprise was petitioner's Video Warehouse in West Long Branch, New Jersey. *Id.* at 61a. On March 15, 1985, the government received district court authorization to conduct electronic surveillance at the warehouse until June 13, 1985. *Ibid.* Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2518(8)(a), requires the immediate sealing of recordings of intercepted conversations "upon the expiration of the [intercept] order." The tapes generated from the surveillance of petitioner's warehouse were, however, not sealed until July 15, 1985. See Pet. App. at 3.

As a result of the investigation, petitioner was indicted in the United States District Court for the District of New Jersey, along with 20 co-defendants, in a 114-count indictment charging multiple violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, and other offenses. The district court denied a pretrial motion joined by all of the original defendants to suppress the tape recordings because of the delay in sealing. Relying on *United States* v. *Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975), the court held that suppression was not required as long as the integrity of the tape recordings was established. Because the defendants had not questioned the integrity of the tapes, the court found the tapes admissible. Pet. App. 285-286.

Following a jury trial, petitioner was found guilty of two substantive RICO offenses (Counts 1 and 2), in violation of 18 U.S.C. 1962(c); RICO conspiracy (Count 3), in violation of 18 U.S.C. 1962(d); conspiracy to use extortionate means to collect an extension of credit (Count 4), in violation of 18 U.S.C. 894; and conspiracy to obstruct commerce by means of extortion (Count 9), in violation of 18 U.S.C. 1951. Pet. App. 295, 47-48. The district court granted petitioner's post-verdict motion for a judgment of acquittal on the RICO offense charged in Count 1. *Id.* at 296-299. Petitioner was sentenced to 20 years' imprisonment and ordered to pay fines totalling $70,000. *Id.* at 3.

2. The court of appeals affirmed the district court's ruling admitting the wiretap tapes. In accordance with *Falcone*, the court of appeals found that suppression of the tapes was unwarranted, "notwithstanding the government's technical infraction of the custody requirements of the unsealing orders," in the absence of any "serious[] conten[tion] that the tapes were subject to tampering." Pet. App. 161. The court of appeals also reinstated the Count 1 RICO conviction, reversed petitioner's conviction on the Count 2 RICO offense, affirmed the other convictions, and remanded the case for resentencing. *Id.* at 161-162.

3. Thereafter, in *United States* v. *Ojeda Rios*, 495 U.S. 257 (1990), this Court rejected the argument that electronic surveillance tapes are admissible if the government can establish their integrity despite delays in sealing. The Court construed 18 U.S.C. 2518(8)(a) to require suppression in the absence of a "satisfactory explanation" for the delay, even when there is no question about the integrity of the tapes. 495 U.S. at 264-265. The Court agreed that the government had in this Court articulated a satisfactory explanation for the

delay, but "remanded for a determination whether the Government's explanation to the District Court substantially corresponds to the explanation it now advances." *Id.* at 267. In a concurring opinion, Justice O'Connor emphasized that the satisfactory explanation must be based on "findings made and evidence presented in the district court, rather than on a *post hoc* explanation given for the first time on appeal." *Id.* at 268.

Following its decision in *Ojeda Rios*, the Court granted certiorari in this case, vacated the Third Circuit's judgment, and remanded for further consideration. *Vastola* v. *United States*, 497 U.S. 1001 (1990).

4. On remand, the court of appeals observed that the government may have offered no explanation for its delay in sealing the tapes at the original suppression hearing because, "acting in reasonable reliance on *Falcone*, it assumed that it could defeat the suppression motion by demonstrating the integrity of the tapes and thus did not find it necessary to introduce evidence on this point." Pet. App. 84. The court remanded for the district court "to exercise its discretion" whether to allow the government to give a satisfactory explanation for the delay. *Id.* at 85. If the district court determined to permit the explanation, it was to hold a hearing in which the government would have the burden of proving that its explanation was the "*actual* reason for the sealing delay." *Id.* at 86. Petitioner's petition for a writ of certiorari from that decision was denied. *Vastola* v. *United States*, 498 U.S. 1120 (1991).

5. On remand from the court of appeals, the district court held that the government had not waived its opportunity to present a satisfactory explanation for the sealing delay because the remand was "the first time that the government has been afforded the opportunity to

present evidence on this issue as this court did not expect such evidence at the time of the sealing delay given the rule in *Falcone*." Pet. App. 190. Following an evidentiary hearing, the district court found that "the actual reason for the sealing delay was that the Assistant United States Attorney in charge of the electronic surveillance, Diana Armenakis, and her supervisor on the case, Thomas Roth, believed that the Wiretap Act did not require sealing until the end of the entire investigation." *Id.* at 198. The district court further found that Roth's and Armenakis's "interpretation of the statute was objectively reasonable at the time of the sealing delay" and thus "that the government [had] offered a 'satisfactory explanation' for the sealing delay." *Id.* at 201. The district court reinstated the Count 1 RICO conviction as directed by the court of appeals and resentenced petitioner to 17 years' imprisonment. See *id.* at 5.

On appeal from those district court rulings, the Third Circuit held that the district court acted within its discretion in providing the government the opportunity, on remand, to demonstrate that it had a satisfactory explanation for the sealing delay. Pet. App. 40. On the merits of that question, although the court of appeals believed that *Ojeda Rios* itself suggested that the government's misunderstanding of the law in this case was reasonable, the court was constrained by its recent decision in *United States* v. *Carson*, 969 F.2d 1480 (1992), to hold that the district court had erred in that respect. Pet. App. 44-45. *Carson* had held that it was not reasonable to conclude from the case law that tapes need not be sealed until the conclusion of the entire investigation. 969 F.2d at 1494. *Carson* further held, however, that even "[w]hen a government attorney's legal conclusion is found to be unreasonable, the explanation for the delay

would still be an objectively reasonable 'mistake of law' if the government can show that its attorney has adequately researched the law or has otherwise acted reasonably." Pet. App. 45. Applying that articulation of the "satisfactory explanation" requirement, the court remanded again to the district court for a determination whether the government attorneys' misunderstanding of the law was the result of reasonable research. *Id.* at 46.

Before remanding the case, the court considered petitioner's contention that the reentry of his conviction on the Count 1 substantive RICO count could not stand because of an inconsistency between the jury's verdicts and the difficulty in determining which of several predicate acts the jury had found. Pet. App. 47-56. Relying on *United States* v. *Powell*, 469 U.S. 57 (1984), and *Griffin* v. *United States*, 502 U.S. 46 (1991), the court of appeals held that the existence of sufficient evidence to support two of the four predicate acts alleged in Count 1 was adequate to sustain petitioner's conviction on that count. Pet. App. 55.

On remand to reconsider the government's explanation for the sealing delay, the district court concluded that Armenakis "acted reasonably under the circumstances." Pet. App. 173. While her "reading and outlining the statute and reviewing the relevant annotations" was not sufficient, the court noted that Armenakis also had "her understanding of the sealing requirement confirmed by the advice of more experienced lawyers in the United States Attorneys Office." *Id.* at 174. The court concluded that "Armenakis' reliance on authoritative advice given by her colleagues constituted an adequate substitute for further reading of the caselaw, and her behavior was objectively reasonable under the circumstances." *Id.* at 175.

6. The court of appeals upheld the district court's conclusion that the combination of Armenakis's own legal research and the confirmation of that research by experienced colleagues rendered Armenakis' conduct objectively reasonable and that the government had therefore presented a satisfactory explanation for the sealing delay. Pet. App. 9-10. The court emphasized that an "inquiry into the reasonableness of an attorney's legal research is necessarily fact and time specific" and that, before the clarification of the law by *Ojeda Rios*, a reasonably prudent attorney could reach the understanding held by Armenakis in this case. *Id.* at 10-11.

Judge Stapleton dissented. He agreed with the majority's statement of the relevant legal principles, but he believed that the government had failed to sustain its burden of showing that Armenakis had reasonably relied on the confirming views of her colleagues, in addition to her legal research. Pet. App. 25-26.

ARGUMENT

1. Petitioner argues (Pet. 13-16, 20-21) that, under 18 U.S.C. 2518(8)(a), the government must offer its explanation for a sealing delay before admission of the tapes. In petitioner's view, the court of appeals erred by giving the district court discretion to allow the government to present its explanation for the sealing delay on remand. That claim lacks merit.

Section 2518(8)(a) provides that "[t]he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom." The statute requires the government to explain a sealing delay in order to make use of the tapes, but it does not provide that a failure to offer

the explanation before the introduction of the tapes precludes the tapes' admissibility. A satisfactory explanation is a "prerequisite" for use of the tapes, but the statute does not state that it must precede use of the tapes. Cf. *Batson* v. *Kentucky*, 476 U.S. 79, 100 (1986) (race-neutral explanation is a prerequisite for sustaining a peremptory challenge after a prima facie case of discrimination is shown; remanding for post-trial proceeding to evaluate whether a prima facie case existed and, if so, whether government's explanation is satisfactory).

Ojeda Rios does not support petitioner's view of the statute. In that case, the government, as required under Second Circuit law, offered an explanation for the sealing delay at the suppression hearing; the question that this Court left open was whether the explanation at trial corresponded to the explanation that this Court had determined to be "satisfactory" under the statute. The Court stated: "A 'satisfactory explanation' within the meaning of § 2518(8)(a) cannot merely be a reasonable excuse for the delay presented at the appellate level. Rather, our review of the sufficiency of the Government's explanation for a delay should be based on the evidence presented and submissions made in the District Court." 495 U.S. at 267.

Consistent with *Ojeda Rios*, the Third Circuit required that the government's proffered reason for the sealing delay be the actual reason for the delay. Pet. App. 86. Despite petitioner's contrary understanding, *Ojeda Rios* did not hold that the actual explanation for the delay must be made on the record before the tapes are admitted. That timing issue was not raised in *Ojeda Rios*, because an explanation had been offered at the suppression hearing.

Petitioner does not cite any case accepting his view that Section 2518(8)(a) requires the satisfactory explanation for a sealing delay to be lodged in the record before admission of the tapes into evidence, and we have discovered no other case dealing with that issue. Moreover, the issue is unlikely to arise in the future because *Ojeda Rios* makes it plain that sealing delays must be explained by the government regardless of the authenticity of the tapes. The issue, therefore, does not warrant this Court's review.

Petitioner also claims (Pet. 16-20) that the district court erred in holding that the government had a valid reason for failing to explain the sealing delay at the suppression hearing. He asserts that any reliance on *Falcone* for that purpose was unreasonable. Whether the district court's interpretation of Third Circuit law in 1985 was correct, as we maintain, or erroneous, as petitioner contends, is not an issue of general application or continuing importance.

2. Petitioner next argues (Pet. 22-23) that the court of appeals misinterpreted *Ojeda Rios* by holding that a "satisfactory explanation" for a sealing delay exists when the responsible attorney has acted reasonably despite arriving at an unreasonable interpretation of the law. In *Ojeda Rios*, the explanation offered for the sealing delay was virtually the same explanation offered in this case, that the responsible attorney "believed that he was not required to seek sealing of the tapes until there was a meaningful hiatus in the investigation as a whole." 495 U.S. at 266. This Court concluded that although that explanation was legally incorrect, it was "objectively reasonable at the time" and thus would constitute a "satisfactory explanation" under the statute if it was in fact the actual reason for the sealing delay. *Ibid.* The court of appeals in this case recognized the

force of the argument that *Ojeda Rios* had already determined that the explanation offered in this case was a "satisfactory explanation." Pet. App. 44-45. But the panel here was constrained to apply the analysis employed in a previous Third Circuit case, *United States* v. *Carson*, *supra*. *Carson* concluded that the view that tapes need not be sealed until the conclusion of an investigation was an unreasonable interpretation of the law, but held that the conduct leading to such a mistake of law "is objectively reasonable * * * when the attorney involved acted as a 'reasonably prudent' attorney would to investigate the legal question involved in a reasonably prudent manner." 969 F.2d at 1494.

Applying the *Carson* analysis, the court of appeals in this case demanded both a showing that the responsible attorney believed that sealing was not required until conclusion of the investigation and proof that the attorney's understanding of the law was the product of a reasonably prudent investigation. Although we believe that this two-part standard is more stringent than that required by *Ojeda Rios*, the result in this case does not conflict with *Ojeda Rios*'s holding that a mistake of law resulting in a sealing delay is a "satisfactory explanation" if it was "objectively reasonable at the time."

Petitioner argues (Pet. 24), as did the dissent in the court of appeals, that the government did not sustain its burden of proving that Diana Armenakis conducted a reasonably prudent investigation by her combination of legal research and confirmation of her understanding with experienced colleagues. The court's decision was correct, and petitioner's disagreement with that fact-bound ruling does not present a question of general importance.

3. Petitioner argues (Pet. 24-27) that the court of appeals erred in upholding his conviction on the Count 1

RICO offense (which necessitated a finding of two predicate acts), when (1) that conviction was inconsistent with the jury's acquittal of petitioner on all but one of the separately charged predicate acts and (2) it was not clear on which second predicate act the jury based the RICO conviction. There is no merit to petitioner's contention.

In *United States* v. *Powell*, *supra*, this Court held that a conviction cannot be attacked on the ground that it is inconsistent with the jury's verdicts on other counts. In *Griffin* v. *United States*, *supra*, this Court held that a conviction on a multiple object conspiracy will be upheld if there is sufficient evidence to support at least one object, even if the general jury verdict does not identify which of the objects the jury found. Despite petitioner's contrary assertion (Pet. 26-27), *Powell* and *Griffin* reflect corollaries of the same principle: each count of conviction is reviewed for the sufficiency of the evidence to support it, without speculation about how the jury arrived at its verdict. In this case, the conviction on the Count 1 substantive RICO charge was supported by sufficient evidence on two of the four alleged predicate acts. Petitioner does not contend to the contrary. Under *Powell* and *Griffin*, the court of appeals correctly upheld that conviction.

4. Finally, petitioner invites (Pet. 27-30) the Court to use this case as a vehicle for clarifying the elements of a RICO conspiracy. He points out that the court of appeals reversed his Count 2 substantive RICO conviction for conducting a criminal enterprise by participating in an unlawful debt collection from Joseph Dwek, based on insufficient evidence that petitioner actually participated in the collection of that debt, but that the court nevertheless affirmed his RICO conspiracy conviction on Count 3 for conspiring to conduct

the criminal enterprise through the collection of the Dwek debt and affirmed his Count 1 substantive RICO conviction, one of the predicate acts of which was petitioner's conspiracy to use extortion to collect loans, including the Dwek debt. Petitioner asserts (Pet. 28-29) that these holdings raise three interrelated questions: (1) whether there is a distinction between *conducting* an enterprise by participating with other persons in the collection of an unlawful debt and *conspiring* with those persons to conduct an enterprise through collection of that unlawful debt; (2) whether to be convicted of RICO conspiracy a person must agree to commit personally a predicate act or merely agree to the commission of the act, a question on which petitioner correctly cites a conflict among the circuits (Pet. 28 n.7); and (3) whether a conspiracy offense may be a predicate act for a RICO conspiracy.

a. On the facts of this case, the distinction between conducting an enterprise by participating with others in the collection of an unlawful debt and conspiring with those others to conduct an enterprise through collection of that unlawful debt. On the facts here, the distinction is straightforward. For petitioner to be guilty of the predicate substantive offense of collection of an unlawful debt, he must participate in that predicate offense directly or as an aider and abetter. Because the evidence was insufficient to prove that petitioner participated in the collection of the Dwek debt, he was acquitted of the Count 2 substantive RICO offense that was based on that predicate substantive offense. The court of appeals correctly held that such acquittal was not inconsistent with petitioner's Count 3 RICO conspiracy conviction, which was based on the same predicate substantive debt-collection offense, because the evidence showed that petitioner agreed to conduct the affairs of the enterprise

through collection of the unlawful debt, although it showed that he agreed that someone else, not he, would collect that debt. See *United States* v. *Shabani*, No. 93-981 (Nov. 1, 1994), slip. op. 7 (gist of conspiracy offense is the agreement).

In addition, petitioner's conviction of the Count 3 conspiracy is subject to affirmance on alternative grounds. As discussed below, it is plain from the most recent court of appeals affirmance of petitioner's Count 1 substantive RICO conviction that petitioner's Count 3 RICO con-spiracy conviction would be affirmed based on the pattern of racketeering activity established by his underlying conspiracy offenses, without regard to the collection of the Dwek debt.

b. Petitioner's second question—whether a RICO conspirator must agree to commit personally a predicate act or merely agree to the commission of that act—is not squarely presented in this case. The jury indicated by a special interrogatory that petitioner's RICO conspiracy conviction (Count 3) was based both on the pattern of racketeering activity alleged in Count 1 and on the collection of various unlawful debts enumerated in Count 2. See Pet. App. 125-126. When the court of appeals affirmed petitioner's Count 3 RICO conspiracy conviction, this Court had not yet decided *Griffin* v. *United States*, *supra*. The court of appeals felt constrained at that time to examine only the collection of the Dwek debt as the predicate for the RICO conspiracy conviction, because of uncertainty under pre-*Griffin* case law whether petitioner's Count 1 conviction (which was prosecuted on the basis of four predicates, only two of which were supported by sufficient evidence) could serve as a valid predicate. See Pet. App. 120 n.17, 126-129. But when, after *Griffin*, the court of appeals most recently affirmed petitioner's Count 1 substantive RICO

racketeering based on two of the predicate acts alleged in Count 1, both of which were conspiracy offenses. See Pet. App. 55-56. Petitioner's Count 3 RICO conspiracy conviction is thus supported independently by a pattern of two predicate conspiracy offenses, in each of which petitioner personally participated as a conspirator. Accordingly, even if, as petitioner suggests, the majority rule accepted by the Third Circuit—that a RICO conspirator need not agree to participate personally in the predicate acts—is wrong, the result in this case would not be different.

c. The third of petitioner's questions—whether a conspiracy offense may be a RICO predicate act—is answered in the affirmative by the statute and does not warrant review. As the Third Circuit held in *United States* v. *Pungitore*, 910 F.2d 1084, 1134-1135 (1990), cert. denied, 500 U.S. 915 (1991), the definitions of "racketeering activity" in 18 U.S.C. 1961(1)(A) and (D) (1988 & Supp. IV 1992), which are phrased, respectively, in terms of "any act or threat involving" or "any offense involving" various types of criminal activities, clearly encompass the crimes of conspiracy to commit the enumerated substantive offenses. Accord *United States* v. *Manzella*, 782 F.2d 533, 537-538 (5th Cir.), cert. denied, 476 U.S. 1123 (1986); *United States* v. *Ruggiero*, 726 F.2d 913, 918-919 (2d Cir.), cert. denied, 469 U.S. 831 (1984). Petitioner has cited no conflicting decisions on this question, and we have discovered none.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

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